2011

Utah Department of Transportation v. FPA West Point, LLC : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff/Petitioner, v. FPA WEST POINT, LLC, a Delaware limited liability company; FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation; BANK OF AMERICA, NA, fka LaSalle Bank; KMART CORPORATION, a Michigan corporation; and NEW ALBERTSON'S INC., an Ohio corporation, Defendants/Respondents.	:	Case No. 20110354

Appeal from an Interlocutory Order of the Third Judicial District Court,
Salt Lake County, State of Utah, Honorable Tyrone E. Medley, Presiding

BRIEF OF DEFENDANT/RESPONDENT KMART CORPORATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

Defendant/Respondent ("Kmart") agrees with the Statement of Jurisdiction in the Brief of Appellant Utah Department of Transportation ("UDOT").

COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the trial court correctly held (i) that the plain language of Utah Code Ann. § 78B-6-11(1)(b) requires the trier of fact to separately assess and determine the value of each and every separate interest in a property; and (ii) that this Court's holding in *State ex rel. Rd. Comm'n. v. Brown*, 531 P.2d 1294 (Utah 1975) ("*Brown*"), conflicts with Utah Code Ann. § 78B-6-511(1)(b) and would nullify the statute, if applied.

STANDARD OF REVIEW

Kmart agrees with UDOT that this Court reviews the decision of the trial court for correctness.

DETERMINATIVE LEGAL PROVISIONS

The following constitutional and statutory provisions are determinative:

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Utah Constitution, Article I, Sec. 22

Private property shall not be taken or damaged for public use without just compensation.

Utah Code Ann. § 78B-6-511

78B-6-511. Compensation and damages -- How assessed.

The court, jury, or referee shall hear any legal evidence offered by any of the parties to the proceedings, and determine and assess:

(1) (a) the value of the property sought to be condemned and all improvements pertaining to the realty;

(b) the value of each and every separate estate or interest in the property; and

(c) if it consists of different parcels, the value of each parcel and of each estate or interest in each shall be separately assessed;

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff;

(3) if the property, though no part of it is taken, will be damaged by the construction of the proposed improvement, and the amount of the damages;

(4) separately, how much the portion not sought to be condemned, and each estate or interest in it, will be benefitted, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit is equal to the damages assessed under Subsection (2), the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit is less than the damages assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken;

(5) if the property sought to be condemned consists of water rights or part of a water delivery system or both, and the taking will cause present or future damage to or impairment of the water delivery system not being taken, including impairment of the system's carrying capacity, an amount to compensate for the damage or impairment;

(6) if land on which crops are growing at the time of service of summons is sought to be condemned, the value that those crops would have had after being harvested, taking into account the expenses that would have been incurred cultivating and harvesting the crops; and

(7) as far as practicable compensation shall be assessed for each source of damages separately.

STATEMENT OF THE CASE

On April 29, 2010, UDOT filed this condemnation action ("Condemnation Action") to condemn a deeded access easement (the "Access") from Bangerter Highway to the West Point Shopping Center ("Shopping Center" or the "Shopping Center Property"), located at the southwest corner of 5400 South St. and Bangerter Highway. FPA owns the Shopping Center Property; Kmart operated a store in the Shopping Center pursuant to a lease and a grant of easement.

By Order dated June 7, 2010, the trial court ordered occupancy of the Access. On or about June 22, 2010, UDOT tore down the Access ramp and closed the Access. In September 2010, FPA filed its Motion to Separate Just Compensation Determinations. By Memorandum Decision, dated January 27, 2011, the trial court granted FPA's Motion.

The trial court held that Utah Code Ann. § 78B-6-511(1)(b) "directs that the assessment of compensation and damages in a condemnation be based on the 'value of each and every separate estate or interest in the property . . .'" (R. 194.) The trial court rejected the following assertion made by UDOT:

> [The] applicable law is found not in § 78B-6-511(1)(b), but in [*Brown*], which held that the "condemning authority is liable for the value of the land taken and for severance damages to the land not taken, and it is from these amounts that the lessee must receive any damages which it may have sustained as a result of the taking."

(*Id.*) (quoting *Brown*, 531 P.2d at 1295). Rather, the trial court "determine[d] that the plain language of § 78B-6-511(1)(b) must be honored and that FPA be granted the opportunity to have its interests valued separately from other interests in the subject

property." (*Id.*) The court concluded that the language of subsection 511(1)(b) "is clear and unambiguous and must therefore be regarded as conclusive." (R. 195.) Recognizing that *Brown* conflicts with subsection 511(1)(b), the court held that "*Brown* must be explained as simply opting to follow a valuation approach that is contrary to the one selected by the Utah legislature, namely the valuation of each interest separately." (*Id.*)

The Condemnation Action remains in its early stages. FPA has not yet answered the Complaint. The parties have not made their initial disclosures, have not had an initial planning meeting, have not conducted discovery, and have not designated experts. The trial court has stayed proceedings pending this interlocutory appeal. (R. 312.)

Kmart asserts claims for damages to its leasehold and easement caused by the taking of the deeded Access. (R. 44-54.) Kmart presumes that FPA will assert claims for just compensation for the taking of its deeded Access, and for severance damages to the remainder of the Shopping Center Property caused by the taking.

STATEMENT OF FACTS

1. For nearly 30 years, Kmart operated a store in the West Point Shopping Center Property, located at the intersection of 5400 South and Bangerter Highway in Taylorsville, Utah, pursuant to a lease dated July 23, 1980 (as amended, "Lease"). (R. 88-99.) The Shopping Center Property currently is owned by FPA. (R. 82-87.)

2. Kmart owned an access easement granted by FPA's predecessor pursuant to a Declaration of Covenants and Restrictions and Grant of Easements dated October 1, 1980 (the "Declaration"). The Declaration granted Kmart a "mutual, non-exclusive, and

reciprocal easement and right-of-way for passage over and use of" the Common Areas of the FPA property. (R. 100-26.)

3. For many years, Albertson's operated a grocery store as a tenant in the Shopping Center. Albertson's vacated the space when it discontinued operations in Utah several years ago. Albertson's lease remained in effect, and was due to expire in May, 2012. (R. 4, 259, 269-69A.)

4. By the Condemnation Action filed on April 29, 2010, UDOT condemned the Access granted by Warranty Deed, which provided direct access to the Shopping Center Property from Bangerter Highway, immediately in front of the Kmart store. (R. 1-12.) For convenience, a copy of an aerial photograph depicting the Shopping Center and the Access (R. 247) is attached as Addendum A to Kmart's Brief in Opposition.

5. By taking the Access, UDOT substantially and materially impaired Kmart's access, causing Kmart's Lease to terminate pursuant to its terms effective June 21, 2010. Kmart operated the store on a month-to-month basis until March 31, 2011, when it closed. (R. 235.)

UDOT's Appraisal of the Loss of the Albertson's Lease to FPA

6. Before filing the Condemnation Action, UDOT commissioned an appraisal ("Appraisal") (R. 249-271A), which appraised the fair market value of the Access taken

by a "before and after approach."[1] (R. 251.) The Appraisal appraised the fair market value of the Shopping Center Property before the taking at $9.94 million, and after the taking at $8.69 million. Subtracting the Property's fair market value after the taking from its value before the taking, the Appraisal appraised the value of the Access at $1.25 million. (R. 268-271A.)

7. In appraising the value of the Shopping Center Property after the taking, the Appraisal assumed that the Access taking would cause Albertson's to terminate its lease when UDOT closed the Access. The Appraisal assumed, however, that Kmart would continue in its Lease. (R. 269.)

8. The Appraisal's appraised value of the Access at $1.25 million rests entirely on the loss of rental income to FPA from the early termination of the Albertson's lease—i.e., the rental income that FPA would have enjoyed from the date that UDOT closed the Access to the expiration of Albertson's lease in May, 2012. The Appraisal did not calculate the loss of rental income to FPA from termination of the Kmart Lease, or the damages to the entire Shopping Center Property caused by the Access taking and the termination of the Kmart Lease. (R. 269A-271A.)

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[1] The Appraisal explained:

> [The] value of the taking (deeded access) is estimated by a before and after approach where value of the larger parcel before the taking is first estimated. Value of the property after the taking is then estimated and deducted from the larger parcel value to arrive at the value of the taking. The value of the taking comprises the value of the portion taken plus severance damages, if any, less special benefits, if any.

(R. 251.)

9. The Appraisal did not appraise the damage to Kmart's Lease, easement, and property interests caused by the Access taking and the termination of the Kmart Lease. The Appraisal did determine, however, that Kmart's lease rate was $3.75 per sq. ft., and "concluded" that market rent was $4.50 per sq. ft. (*Id.* at 21.) Therefore, according to UDOT's Appraisal, Kmart's Lease had a "bonus value" of at least $0.75 per sq. ft. ($4.50 - $3.75 = $0.75). (R. 260A.)

UDOT's Deposit of its Appraised Value for the Benefit of all Owners

10. Before filing the Condemnation Action, UDOT (i) did not make a good faith offer to purchase Kmart's property interests pursuant to Utah Code Ann. § 78B-6-505; (ii) did not provide Kmart with the notices specified by Utah Code Ann. § 78B-5-505(2); and (iii) did not provide Kmart with its Appraisal of the property interests taken or damaged.

11. In support of its Motion for Order of Occupancy, *Pendente Lite*, UDOT deposited into Court the "appraised value of the premises sought to be condemned, [which] is $1,250,000, with no severance damages . . . ." (R. 22.)

12. In its Memorandum in Support of Plaintiff's Motion to Stay Proceedings Pending Interlocutory Appeal, UDOT took the position that it had

> deposited $1,250,000 with the Court for the benefit of the defendants in this action in order to obtain its Order of Occupancy. Aff. of McMillan at ¶ 19 and Notice of Deposit docketed May 26, 2010. Defendants are free to withdraw these funds "as an advance on the just compensation to be awarded in the proceeding." Utah Code Ann. § 78B-6-510(6)(a).

(R. 214.)

SUMMARY OF ARGUMENT

Reading its plain language, the trial court correctly held that Utah Code Ann. § 511(1)(b) requires the trier of fact to separately determine and assess the "value of each and every separate estate or interest in the property." The trial court correctly rejected UDOT's assertion that subsection 511(1)(a) requires the trier of fact to apportion the value of the various estates and interests in property from the total value of the property in gross, and UDOT's assertion that the total amount of just compensation and damages cannot exceed the total value of the property.

No words in section 511(1) require a trier of fact to apportion just compensation among the several owners of estates and interests in property, and no words impose any kind of limitation on the amount of just compensation or damages to be awarded. UDOT's reading of section 511(1) grafts words and improper meaning onto the plain statutory language, and ignores subsections (2) through (7) of section 511. Those subsections specify that the trier of fact is to separately assess and determine each element of damages, and to separately assess any special benefits. Because Kmart and FPA seek damages to their respective property interests caused by the Access taking, those subsections are material to and at the heart of this case. Read in its entirety, section 511 requires the trier of fact to separately assess the value of each estate and interest in each property, to separately assess the value of each parcel (and each estate and interest in each parcel), to separately assess each source of damages, and to separately assess any special benefits.

The trial court also correctly held that *Brown* conflicts with the plain language of section 511. *Brown* never once referenced section 511, or the constitutional principles and many precedents of this Court that govern the award of just compensation. As this Court recently reaffirmed, it is "axiomatic that our precedent must yield when it conflicts with a validly enacted statute." *Patterson v. Patterson*, 2011 UT 68, ¶ 37, 694 Utah Adv. Rep. 25 (citing *Gottling v. P.R. Inc.*, 2002 UT 95 ¶ 7, 61 P.3d 989). Moreover, because *Brown*'s statements regarding apportionment are dicta, the trial court was not bound to follow or apply *Brown*.

Equally important, to the extent that *Brown* imposes a judicial gloss on the plain language of section 511, *Brown* violates a cardinal rule of statutory construction: a statute must be read to avoid an unconstitutional result. As this Court has held for more than a century, and has recently reaffirmed in *UDOT v. Admiral Beverage*, 2011 UT 62, 693 Utah Adv. Rep. 16, a property owner must be placed in as good a position moneywise as the owner would have occupied but for the taking. *Brown*'s twin statements that the value of all estates and interests in property must be apportioned from the value of the entire property in gross, and that just compensation (including damages) to each property owner cannot exceed the fair market of the entire property, by definition violate these constitutional principles and precedents. *Brown* applies only if the just compensation to all owners in total exceeds the fair market value of the entire property, and therefore prevents each owner from enjoying full just compensation for property taken or damaged.

Finally, UDOT's assertion that *Brown* enables UDOT to negotiate voluntary agreements to purchase property before filing condemnation actions, is a complete non-

sequiter. There is no nexus at all between the method by which the trier of fact determines and assesses just compensation at trial, and a condemning authority's pre-litigation negotiations with a property owner. As the facts of this case establish, UDOT could have entered a voluntary agreement with FPA regardless of the method used to value FPA's interests, and regardless of UDOT's failure to negotiate with Kmart. And UDOT could not have extinguished or affected Kmart's right to just compensation, whether or not it reached agreement with FPA. If anything, separate valuation of the interests of Kmart and FPA would promote the statutory scheme by specifying the amount of money deposited into court based on the appraised value of each separate property interest, rather than requiring Kmart and FPA to attempt to apportion the money between themselves.

For all of these reasons, this Court should affirm the Memorandum Decision of the trial court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT UTAH CODE ANN. § 511(1)(b) REQUIRES THE TRIER OF FACT TO SEPARATELY ASSESS THE VALUE OF EACH AND EVERY INTEREST IN THE PROPERTY.

Section 511(1)(b) clearly and plainly states that the finder of fact must "determine and assess" the "value of each and every separate estate or interest in the property." UDOT argues that this plain direction cannot mean what it says, because it would render subsection (1)(a) superfluous. (Pet. Br. at 7-8.) Subsection 1(a) requires the trier of fact to assess the "value of the property sought to be condemned and all improvements pertaining to the realty." UDOT argues that, "if the property as a whole served no

limiting function, there would be no need to determine it." (Pet. Br. at 7.) (emphasis added). UDOT further argues that if "each estate or interest were entitled to be valued without reference to the gross value of the parcel giving rise to it, there would be no need to separately value the underlying parcel." (*Id.* at 8.) (emphasis added).

UDOT's reading of the statutory language is flatly wrong for three reasons. First, UDOT rewrites subsection 1(a) well beyond its plain language. As the passages highlighted above establish, UDOT grafts onto the plain language of subsection 1(a) the requirement that the "gross value" of the property serve a "limiting function" on just compensation awards. Nowhere does plain statutory language impose such a cap; the sole source is this Court's ruling in *State Road Comm'n v. Brown*, 531 P.2d 1294 (Utah 1975), which made no reference at all to the plain statutory language, but only to an A.L.R. digest. (*See* Section II, *infra.*) As in *Miller v. Weaver*, 2003 UT 12, 66 P.3d 592, cited by UDOT (Pet. Br. at 5), UDOT's reading of subsections 1(a) and (b) imposes "an unreasonable and unworkable construction, and requires [this Court] to infer language and meaning that does not appear on the face of the statute." 2003 UT 592, ¶ 19.

Second, any fair reading of subsection 511(1) shows that its subsections do not render each other superfluous, but complement and clarify each other. Again as in *Miller*, *id.*, subsections (1)(a) through (1)(c) are "expository," with each subsection providing "further elucidation" of subsection 511(1). Subsection (1)(a) directs the trier of fact to determine and assess the value of all property taken, and its improvements. Subsection (1)(b) applies if there are multiple estates and interests in property, and directs the trier of fact to determine and assess each separate interest. Subsection (1)(c) applies

if there are multiple parcels, and directs the trier of fact to separately assess each estate and interest in each parcel. UDOT's assertion that the trial court's reading of subsection (1)(b) renders subsection (1)(a) superfluous proves too much; by the same argument, subsection (1)(b) would render subsection (1)(c) superfluous, too. In reality, each subsection provides further meaning and elucidation; one does not destroy any of the others. *See Redecker v. Salisbury*, 952 P.2d 577, 583 (Utah Ct. App. 1998) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.") (emphasis added).

The trial court also correctly held that *Town of Perry v. Thomas*, 22 P.2d 343 (Utah 1933) "confirmed that the general rule of valuing 'in gross'" is inapplicable in Utah. (R. 195.) Reading the predecessor statute to subsection (1)(c), *Town of Perry* held that each property owner "is entitled to have separately assessed the value of land in separate ownership and each estate or interest therein . . . ." 33 P.2d at 347. UDOT attempts to distinguish *Town of Perry* by asserting that it addressed the "lump-sum valuation of multiple, individually-owned parcels" (Pet. Br. at 4), but cannot explain why estates and interests in a single parcel are to be valued separately under subsection (1)(c) when multiple parcels are taken or damaged, but to be apportioned under subsection (1)(b) if only a single parcel is taken or damaged. It defies common sense to suggest that the constitutional method of determining the value of estates and interests in property varies with a condemning authority's discretionary decision to file a single action against multiple parcels, or separate actions for each parcel. *See* Utah Code Ann. § 78B-6-507(2)

("All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff . . . .").

Third, UDOT's reading of subsection 511(1) ignores subsections (2) through (7). These subsections all require the trier of fact to "determine and assess" different kinds of damages: severance damages to the remainder property (subsection (2)); damages to property not taken but damaged (subsection (3)); special benefits to the remainder property created by construction of the improvement (subsection (4)); damages to a water delivery system (subsection (5)); and crop-loss damages (subsection 6)).

Significantly, subsection (7) requires these damages to be assessed separately: "[A]s far as practicable compensation shall be assessed for each source of damages separately." And subsection (4) requires the trier of fact to assess "separately how much the portion not sought to be condemned, and each estate or interest in it, will be benefitted, if at all, by the construction of improvements." (emphasis added).

UDOT ignores the important point that this Condemnation Action involves a partial taking of a deeded Access, and damages to FPA and to Kmart caused by the partial taking. Kmart claims damages to its leasehold and to its easement caused by the taking.[2] Presumably, FPA will claim damages to the fee caused by the taking.

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[2]Kmart's leasehold and easement constitute protectable property interests, and Kmart is entitled to just compensation when those interests are taken or damaged. *See, e.g., Colman v. Utah State Land Bd.*, 795 P.2d 622, 626 (Utah 1990) (both a lease and an easement are protectable property interests, as "[a] lessee holding under a valid lease also has a property interest protected by the takings clause of the constitutional provisions[.]"); *Wasatch Gas Co. v. Bouwhis*, 26 P.2d 548 (Utah 1933) (condemnation of easement over land for gas pipe held "taking" of private property, for which compensation must be paid).

Subsection (7) plainly requires the trier of fact to determine and assess these damages separately.[3]

As UDOT acknowledges, this Court "reads the plain language of the statute as a whole, and interpret provisions in harmony with other statutes in the same chapter and related chapter." (Pet. Br. at 5) (quoting *Miller*, *supra*, ¶ 17). *Accord Faux v. Mickelsen*, 725 P.2d 1372, 1375 (Utah 1986) (following the "cardinal rule that the general purpose, intent or purpose of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object"). Here, all the subsections of section 511, read in harmony, establish a "manifest object" that the trier of fact separately determine and assess the fair market values of, and damages and special benefits to, each separate interest in each parcel of property. Not a single sentence in section 511 fairly can be read to even suggest that the value of each interest is to be measured by the gross value of the entire property and apportioned, or that the gross value of the property serves a "limiting function" or as a "cap" on just compensation or damages to be awarded. UDOT's assertion (Pet. Br. at 5), that section 511(1)(b) is "susceptible of two

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[3]UDOT's Appraisal purported to value the Access taken at $1.2 million, with no severance damages to FPA's remainder property and no damages to Kmart. (R. 21, 25.) However, the appraisal determined the fair market value of the Access by subtracting the value of the remainder property from the value of the entire property before the taking. This is the measure of severance damages. *See* Utah Code Ann. § 78B-6-511(2). *See also UDOT v. Admiral Beverage Corp.*, 2011 UT 62, ¶¶ 33, 40 & n. 4; *Utah Dep't of Transp. v. Rayco Corp.*, 599 P.2d 481, 490 (Utah 1979) ("The proper measure of severance damages to the remainder is the difference between the fair cash market value before and after the taking."); *Provo City Corp. v. Knudsen*, 558 P.2d 1332, 1334 (Utah 1977) (landowner was "entitled to compensation, not only for the market value of the land directly so affected, but also for severance damages resulting for decreasing the market value of the remainder of her land," caused by aerial easement).

constructions, one which will carry out and the other defeat [its] manifest object," is wrong. Because no language in section 511 purports to apportion or to impose a "limiting function" on just compensation awards, the trial court's reading of section 511(1)(b) does not conflict with or defeat its "manifest object."

This Court should affirm the Memorandum Decision of the trial court.

II. THE TRIAL COURT CORRECTLY HELD THAT *BROWN* CONFLICTS WITH THE PLAIN LANGUAGE OF SECTION 511 AND THE STATUTORY SCHEME ESTABLISHED BY THE LEGISLATURE.

UDOT asserts that "*Brown* sets out the correct standard for calculating condemnation damages" (Pet. Br. at 9), and that "[n]o subsequent case has cast doubt on the continued vitality of that longstanding precedent." (*Id.* at 4.) The first assertion is contradicted by the trial court's recognition that *Brown* conflicts with the plain statutory language for determining condemnation awards. The second assertion is contradicted by this Court's recent decision in *UDOT v. Admiral Beverage Corp.*, 2011 UT 62, 693 Utah Adv. Rep. 16, which, if *Brown* were controlling, requires this Court to reverse *Brown* for the same reasons that, in *Admiral Beverage*, this Court overruled *Ivers v. UDOT*, 2007 UT 19, 154 P.3d 802.

A. Because *Brown* Conflicts with the Plain Statutory Language, it is Axiomatic that *Brown* Must Yield to Section 511.

This Court held in *Brown*:

> The rule is generally recognized . . . that, where there are several interest or estates in a parcel of land of real estate taken by eminent domain, a proper method of fixing the value of, or damage to, each interest or estate, is to determine the value of, or damages to, the property as a whole, and then to apportion the same among the several owners according to their

> respective interests or estates, rather than to take each interest or estate as a unit and fix the value thereof or damage thereto separately. . . .
>
> The total of all interests cannot exceed the value of the property as a whole.

531 P.2d at 1295. The sole support for this broad statement was an American Law Report published at 69 A.L.R. 1263 (1930), and titled: "Are different estates or interests in real property taken under eminent domain to be valued separately, or, is entire property to be valued as a unit and the amount apportioned among separate interests."

Brown did not consider, and made no reference at all, to Article I, Section 22 of the Utah Constitution, to the Utah Eminent Domain Code, (including the section now codified as section 511), or to any of this Court's longstanding precedents holding that property owners are entitled to just compensation to the extent of their damages suffered, *see, e.g., Stockdale v. Rio Grande W. Ry. Co.*, 77 P. 849, 852 (1904), and to be "put in as good a position money wise as they would have occupied had their property not been taken." *State ex rel. Rd. Comm'n v. Noble*, 305 P.2d 495, 497 (Utah 1957).

The trial court correctly held that *Brown* conflicts with the plain language of section 511. "It is axiomatic that our precedent must yield when it conflicts with a validly exacted statute." *Patterson v. Patterson*, 2011 UT 68, ¶ 37, 694 Utah Adv. Rep. 25 (citing *Gottling v. P.R. Inc.*, 2002 UT 95 ¶ 7, 61 P.3d 989).

B. The Trial Court Correctly Disregarded *Brown* Because its Statements Regarding Apportionment are Dicta.

The trial court correctly applied section 511 and disregarded *Brown* for the additional reason that *Brown's* statements are dicta, and thus have no controlling or binding effect. Statements are dicta if they are not necessary or essential to the court's decision. *See, e.g., Consolidation Coal Co. v. Emery County*, 702 P.2d 121, 125 (Utah 1985) (language was dictum "in that it was not essential to the resolution of the issue in the case"); *In re Clark's Estate*, 354 P.2d 112, 115 (Utah 1960) ("The quoted statement as found [in the case] was not necessary to the decision of that case and must be considered dicta."). Of course, dicta is "without binding effect" on future decisions. *State v. Laris*, 2 P.2d 243, 251 (Utah 1931) ("[e]very opinion must be read and considered in light of the facts and in view of the particular question or questions presented for decision").

Brown's statements as to valuing the property as a whole and thereafter apportioning separate interests, the total of which cannot exceed the total value of the property, are dicta. That is, the only issue presented and argued in *Brown* did not involve the valuation of the property as a whole followed by apportionment among separate interests or whether the total value could exceed the whole; nor were those statements necessary to the ultimate decision. *Brown* addressed and reversed the trial court solely on an erroneous jury instruction as to inclusion of severance damages for personal property located in the store which became obsolete by the taking, as distinguished from fixtures, which would have been compensable. *See Brown*, 531 P.2d at 1296 ("This latter part

[instructing as to severance damages for personal property] is clearly erroneous and undoubtedly caused the jury to give severance damages in an amount greater than that testified to by the witnesses.").

It is immaterial that *Brown* additionally raised or opined on the collateral issue of valuing separate interests with regard to the property's total value within the opinion, or that all members of the court concurred, as the issue was not before the court and the statements were wholly unnecessary to deciding the issue actually presented, argued and decided. At best, the statements served merely to illustrate a "generally recognized rule" (*id.* at 1295) in eminent domain law that was not held specifically applicable to Utah or otherwise expounded on in any manner. It certainly cannot be read that way in retrospect, given the ample statutory and case law authority it squarely contradicts. Indeed, if *Brown*'s statements regarding apportionment were central or necessary to the ruling, *Brown* presumably would have addressed competing arguments or contrary rules. Because those statements are dicta, the trial court correctly disregarded *Brown* and applied the plain language of section 511.

C. To the Extent that *Brown* is Controlling and Section 511(1) is Ambiguous, it Must be Construed to Avoid the Inherent Constitutional Conflict Reaffirmed in *Admiral Beverage*.

UDOT's assertion that *Brown* is consistent with subsection 511(1) (Pet. Br. at 11) makes no mention of another rule of statutory construction that has particular application here: As this Court has emphasized, "we have a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities." *In re Marriage of Gonzalez*, 2000 UT 28, ¶ 23, 1 P.3d 1074

(quoting *State v. Bell*, 785 P.2d 390, 397 (Utah 1989)). *See also Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶ 31 ("[W]e strictly construe any ambiguity in statutory language purporting to grant the power of eminent domain in favor of the property owner and against the condemning authority").[4]

To the extent that *Brown* is controlling, and that section 511(1) is ambiguous, this Court should overrule *Brown* for the same reasons that it overruled *Ivers v. UDOT*, 2007 UT 19, 154 P.3d 802, in *Admiral Beverage*.

First, *Brown,* like *Ivers*, "contravenes [this Court's] long-standing precedent holding that constitutional requirements are satisfied only when a property owner is made whole by placing him in as good a position as he would have occupied but for the taking," and "long-standing precedent allowing recovery for all damages caused by a taking." *Admiral Beverage*, 2011 UT 62, ¶ 28. In *Admiral Beverage*, this Court stated:

> Once a landowner demonstrates that a protectable property interest "has been taken or damaged by government action," *Harold Selman*, 2011 UT 18, ¶ 23 (internal quotation marks omitted), the landowner is entitled to "just compensation," UTAH CONST. art. I, § 22. And it is well established that when the requirement of "just compensation" is triggered, the landowner is entitled to compensation "to the extent of the damages suffered." *Stockdale*, 77 P. at 852. This has been interpreted to require "'that the owners must be put in as good a position moneywise as they would have occupied had their property not been taken.'" *City of Hildale v. Cooke*, 2001 UT 56, ¶ 19, 28 P.3d 697(quoting *State ex rel. Rd. Comm'n v. Noble*, 305 P.2d 495, 497 (Utah1957)); *see also Seaboard Air Line Ry. Co.*

[4] Although *Marion Energy* expressly addressed ambiguity in a statute purporting to grant the power of eminent domain, Kmart submits that its reasoning should extend to section 511, and the principle that a statute should be construed to avoid constitutional conflict or infirmity. Just as the statute purporting to grant the power of eminent domain derogates an owner's property rights, UDOT's reading of section 511 (ignored in *Brown*), derogates an owner's constitutional right to full damages and just compensation for a taking.

> *v. United States*, 261 U.S. 299,304 (1923) ("[T]he owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."). And "[t]he constitutional requirement of just compensation derives 'as much content from the basic equitable principles of fairness as it does from technical concepts of property law.'" *Utah State Rd. Comm'n v. Friberg*, 687 P.2d 821, 828 (Utah 1984) (quoting *United States v. Fuller*, 409 U.S. 488, 490 (1973)). "[T]o be fair and just, [compensation] must reflect the fair value of the land to the landowner." *Id.* Compensation meets this standard of fairness when it makes the landowner financially whole by placing him in the position he would have occupied were his property not taken. *See id.; see also Seaboard*, 261 U.S. at 304.

Id.

By definition, *Brown* conflicts with these bedrock constitutional principles. Requiring property to be valued in gross, with compensation to be apportioned among the owners of all estates and interests in the property, and without regard to valuation of the separate interests of each owner or the separate damages suffered by each owner, means that each owner will not be placed in a good of a position as the owner would have been but for the taking or damage. By definition, *Brown*'s dictum that "the total of all interests cannot exceed the value of the property as a whole," comes into play only if the just compensation required to make all owners whole, exceeds the value of the property in gross. Only when the dictum conflicts with the constitutional right to just compensation does it affect the just compensation awarded, by placing a cap on the award.

Here UDOT has appraised the value of the entire property before the taking at $9.4 million, and after the taking at $8.69 million, with the value of the Access at $1.25 million. If, pursuant to the trial court's ruling, the trier of fact at trial separately assesses and determines the just compensation to be awarded to FPA and Kmart, the awards may or may not exceed $9.4 million, or whatever other value the trier of fact determines for

the property in gross before the taking. If the awards do not exceed the value of the property in gross, then *Brown* does not apply. If the awards exceed the value of the property in gross, then applying *Brown* conflicts with the constitutional principles that each property owner must be compensated for all damages suffered, and placed in as good a position as each would have occupied but for the taking.

Second, *Brown*, like *Ivers*, "runs afoul of the statutory framework that the legislature has put in place for assessing severance damages," and just compensation. As in *Ivers*, UDOT could take property without paying compensation for all property taken or damaged. *Admiral Beverage, supra,* ¶¶ 32, 34. (*See also*, Section I, *supra*.)

Third, overruling *Brown*, like *Ivers*, will cause "more good than harm." *Admiral Beverage, supra*, ¶ 36. For the reasons stated in the following Section, overruling *Brown* not only will ensure that each property owner will be awarded full compensation and damages, but will promote several policies embodied in the Eminent Domain Code.

To the extent that *Brown* is controlling, this Court therefore should overrule *Brown* and affirm the Memorandum Decision of the trial court.

III. UDOT'S ASSERTION THAT SEPARATE VALUATION WOULD FRUSTRATE THE STATUTORY SCHEME IS ILLOGICAL; IF ANYTHING, IT WOULD PROMOTE THE STATUTORY SCHEME.

UDOT asserts that separate valuation of each estate or interest by the trier of fact would frustrate the statutory scheme, because it would render "futile" a condemning authority's "statutorily mandated negotiations" with the property owner. UDOT argues that if the "compensation were due to each interest holder, unconstrained by the property's value in gross, . . . the owner's agreement to a sales price could not resolve

any issues of additional compensation due other interest holders." (Pet. Br. at 4.) "[H]olders of subsidiary interests would still have potential unsatisfied claims against the condemnor that could thwart a negotiated purchase." (*Id.* at 8.)

The assertion is illogical, and a red herring. There is no nexus at all between the assessment of just compensation by the trier of fact, and a condemning authority's duty to negotiate with the owner to purchase property before filing a condemnation action. A condemning authority must negotiate with each "property owner" whose property it intends to acquire. *See* Utah Code Ann. § 78B-6-505(1). That duty exists whether or not the trier of fact assesses the value of each property owner's interest separately, or apportions it from the value in gross. Contrary to UDOT's assertion, UDOT cannot extinguish "potential unsatisfied claims" (Pet. Br. at 8) by negotiating a voluntary agreement with the fee owner, because every owner whose property is taken or damaged obviously is entitled to just compensation.

The circumstances here demonstrate the fallacy of UDOT's assertion. Before filing this Condemnation Action, UDOT unsuccessfully negotiated with FPA, offering "at least" the appraised value of $1.25 million. (R. 21, 25.) If FPA had accepted the offer, however, Kmart still would have had its "unsatisfied claim" for just compensation, and UDOT still would have filed this Condemnation Action, but without FPA as a party.[5] To avoid litigation altogether, UDOT would have had to negotiate a separate agreement with Kmart. If anything, valuing FPA's and Kmart's interests separately would increase

[5]At the very minimum, if UDOT had continued to attempt to ignore Kmart altogether, UDOT would have been a defendant in an action by Kmart for the taking or damaging of its property interests.

the likelihood of successful pre-filing negotiations. As it is, UDOT required FPA to apportion the $1.25 million offer with Kmart, which effectively ensured the futility of the negotiations.

Further, requiring FPA and Kmart to apportion the $1.25 million between themselves effectively nullifies the statutory right of a property owner to withdraw money deposited into court as a condition precedent to an order of occupancy. Utah Code Ann. § 78B-6-510(3)(a) requires a condemning authority, as a condition precedent to occupancy during the litigation, to file with the clerk of court a "sum equal to the condemning authority's appraised valuation." Subsection 6(a) authorizes the property owner to apply to the court to withdraw the money, as an advance payment of the just compensation ultimately to be awarded. The purpose of subsection 6(a) is to ensure that the property owner has the use and enjoyment of the proceeds once it is deprived of the use and enjoyment of its property.

Here, in support of its Motion for Occupancy *Pendente Lite*, UDOT deposited $1.25 million with the clerk of court. UDOT has stated repeatedly that this $1.25 million is available to both Kmart and FPA "to withdraw at any time without prejudice to a claim for additional compensation at trial." (Statement of Facts, *supra*, ¶ 12.)

By forcing FPA and Kmart to apportion between themselves the $1.25 million, UDOT has effectively nullified each property owner's statutory right to withdraw the funds deposited with the court. If a condemning authority were to value each owner's interest separately, each owner could make an independent decision whether or not to

withdraw the funds deposited for its interest. Separate valuation does not frustrate the statutory scheme, but promotes it.

For these same reasons, "more good than harm," *Admiral Beverage*, *supra*, ¶ 16, would result if this Court overrules *Brown*.

CONCLUSION

The trial court correctly held that Utah Code Ann § 78B-5-511(1)(b) requires the trier of fact to separately determine and assess the value of each estate and interest in property taken or damaged. The trial court correctly held that *State ex rel. Rd. Comm'n. v. Brown*, 531 P.2d 1294 (Utah 1975) ("*Brown*"), conflicts with Utah Code Ann. § 78B-6-511(1)(a), and effectively would nullify the statute if applied. This Court should affirm the trial court for the reasons stated in its Memorandum Decision, and for the additional reasons stated in this Brief in Opposition: (i) the statements in *Brown* are dicta, properly disregarded by the trial court, or the (ii) statements conflict with the long-standing constitutional principles recently reaffirmed by this Court in *UDOT v. Admiral Beverage Corp.*, 2011 UT 62, 693 Utah Adv. Rep. 16.

Dated this 23rd day of November 2011.

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CERTIFICATE OF SERVICE

I herewith certify that two true and correct copies of the foregoing Brief of Defendant/Respondent Kmart Corporation was served upon the following by hand-delivery this 23rd day of November 2011:

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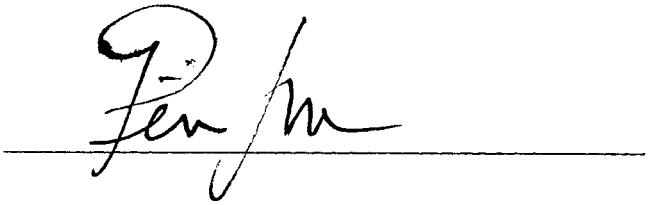

ADDENDUM A